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Rights, Duties and Conditioning Welfare

Amir Paz-Fuchs

The relationship between rights and duties is complex. The political philosophy that was prominent in the first few decades of the welfare state was that one's rights are grounded in one's "social citizenship" and that they provide a strong reason to place a duty on the state. But this consensus, if indeed it existed, was short lived. To an increasing degree, parliaments, administrators and academics are advancing an alternative ideal. This ideal of "no rights without responsibilities" is nowhere more apparent than in contemporary welfare-to-work programs. The paper investigates this claim and suggests that welfare rights under current welfare-to-work programs are constructed as relying in a strong sense upon the fulfillment of duties. In other words, it is not only that the implementation and execution of the legal right depend on adherence to certain conditions. It is argued that the right itself is *identifiable* as contingent on meeting these conditions.¹ The paper assesses the legal theories that suggest mechanisms to deal with the interplay between benefits, rights and duties.

This paper begins with a portrayal of the two prominent rights theories: the choice theory and the interest theory. Both are helpful in addressing a matter that is of relevance for understanding the nature of the duty of relief that the state holds towards welfare claimants. It will prove important to assess whether such a duty derives from a right to relief or is independent of such a right.

However, the choice and interest approaches, along with their assumption of a discrete existence of rights and duties as independent concepts, signify only the start of the trail insofar as the relationship of welfare rights and duties is concerned. Some authors have suggested a clear divide between the Poor Law's construction of duties owed to the indigent and the post-war agenda of welfare rights. Yet, as the second and third sections indicate, reforms of the past two decades have managed to change the character of welfare rights in a novel way that is increasingly represented as "contractual" in nature, and has perhaps even "changed the fundamental legal basis" of welfare rights.² This change has led some authors to ask, somewhat dramatically, if the era of social justice is drawing to a close.³ Though this may not be the case, it is difficult to dispute that under these reforms behavioral requirements have become preconditions of eligibility and that such preconditions have changed the way we conceive of rights and duties in state welfare provision. The paper's final section offers an overview of the general approaches to the doctrine of illegitimate conditions.

1. In this paper, unless otherwise mentioned, I refer to *legal* rights when discussing rights. The applicability of the claims to non-legal rights requires further investigation.

2. Neville Harris, "The Welfare State, Social Security and Social Citizenship Rights" in N. Harris, ed., *Social Security Law in Context* (Oxford: Oxford University Press, 2000) at 3.

3. David Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press, 1999) at 2.

A. The Theoretical Background

Some duties derive from, and are a consequence of, rights. My right to walk at leisure unimpeded in the city centre is the source of your duty not to stop me from doing so. My right to have the furniture that I paid for delivered to me is the reason the store has a duty to do so. So far this is familiar territory. But as Austin and Bentham have stated, and few have contested,⁴ rights are not the only source of duties. Following their terminology, we should distinguish between *absolute* duties, that have no correlative rights, and *relative* duties, which do.⁵ The theory of restricted correlativity suggests, therefore, that every right is a basis for a duty, but only some duties imply a right.⁶ Further, while the duty is a ground for action, the rights serve as a ground for the duty.⁷ Therefore, by being closer to the acting agent, one identifies the duty that serves as a reason for an action before identifying if it is grounded in a right. So we may know that people have a duty not to burn the national flag or harm their dogs, but does this mean that others have a right that flags not be burnt or that dogs have a right not to be harshly treated? Not necessarily. We should be asking, therefore: if not all duties correlate with rights, what are the criteria for deciding that a specific duty is grounded in a right? And in relation to our present issue: assuming that it is not contested that, under the Poor Law or welfare state regime, one can identify a duty towards the poor, how may we deduce whether a right to welfare was the source of this duty? Two general approaches address this sort of question: the interest (or benefit) theory of rights and the choice (or will) theory of right.⁸

i) The Interest theory: A simple account of the interest theory holds that Jack has a right that Jill perform A, and hence Jill has a duty towards Jack to do A, if and only if Jill has a duty to do A *and* performance of A by Jill would benefit Jack. In response to critiques lodged against this formulation, interest theorists clarified that the benefit involved need not be *actual*, but may be *intended* by Jill. So if I have arranged for a delivery to be made at noon to my house but, falling behind schedule, I would prefer that it be delayed, this would not mean that I no longer have a right that the delivery be made at noon, despite the fact that this would no longer be beneficial to me.⁹ A benefit to me had been intended. Interest theorists

4. Matthew Kramer, "Getting Rights Right" in M. Kramer, ed., *Rights, Wrongs and Responsibilities* (Basingstoke: Palgrave, 2001) 28 at 43 for example, states that rights and duties are indeed correlative in the sense that the existence of a right entails the existence of a duty *and vice versa* [emphasis added]. In another paper, Kramer argues that rights and duties are correlative *by definition*: Matthew Kramer, "Rights Without Trimmings" in Matthew Kramer, N.E. Simmonds & Hillel Steiner, eds., *A Debate Over Rights* (Oxford: Clarendon Press, 1998) 7 at 24.

5. John Austin, *Lectures on Jurisprudence* (London: Murray, 1880) at 161-62 (Lecture XII); Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1949) at 85, n. 86; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1996) at 265.

6. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 186.

7. *Ibid.* at 180.

8. Alon Harel, "Theories of Rights" in M. Golding & W. Edmundson, eds., *The Blackwell Guide to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005) at 191.

9. See similarly Joseph Raz, "Promises and Obligations" in P.M.S. Hacker & J. Raz, eds., *Law, Morality and Society* (Oxford: Clarendon Press, 1977) 210 at 213-14.

also addressed the issue of the nature of the right-holder, so that laws protecting the environment do not necessarily grant rights to beaches. Austin states that duties towards something other than a person and towards non-determinate person are absolute duties, i.e. duties that have no correlative rights.¹⁰ As we are interested here in duties towards, in Bentham's terms, "assignable individuals,"¹¹ we need not belabor this point. H.L.A. Hart raises a difficulty that is more general and more challenging for the interest theory than these two:

if to say that an individual has such a right means no more than that he is the intended beneficiary of a duty, then "a right" in this sense may be an unnecessary, and perhaps confusing, term in the description of the law; since all that can be said in a terminology of such rights can be and indeed is best said in the indispensable terminology of duty.¹²

This critique suggests that, irrespective of its merits, the interest theory is not always helpful in identifying whether or not a right underlies a duty in general, and a duty to provide the material goods necessary for subsistence, in particular. It also illuminates the most formidable advantage of its rival theory: the choice theory of rights.

ii) The Choice Theory: According to this theory, a right is identified as the grounds for a duty not when the purported right-holder benefits from the duty, but rather when he or she has "control over the incidence of the duty."¹³ Kelsen views the doctrine that "a legal right is a will recognized by the law" as more convincing because the "power which . . . is the essence of an individual's right consists in the fact that the legal order attaches to the expression of the individual's will that effect at which the will is directed."¹⁴

The advantages of this theory are clear: first, though some may object to the assertion that animals and inanimate objects are only owed duties and are not the bearers of rights, the choice theory has the advantage of justifying this exclusion on *conceptual*, as opposed to ideological, grounds: they cannot control the incidence of the duty. Moreover, both in law and in morals the fact that one benefits from a duty does not imply that one holds a right to the benefit. The examples of charity and mercy are helpful in this case. It is not only that "there is something indecent in making a claim to beneficence."¹⁵ The fact that charity or mercy may not be *demanded* or imposed upon us seems like an important fact of their character. And this is highly related to the fact that to speak of a *right* to charity or to mercy seems like a misnomer. Hart, when discussing moral rights and duties, stresses that one's promise to a friend to take care of the latter's mother makes

10. Austin, *supra* note 5 at 161-62 (Lecture XII). But cf. Raz, *supra* note 6 at 178 who sees no conceptual problem in attributing rights to a dog, if the necessary conditions apply.

11. Bentham, *supra* note 5 at 188-89.

12. H.L.A. Hart, "Bentham on Legal Rights" in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence*, 2nd Series (Oxford: Clarendon Press, 1973) 171 at 190.

13. David Miller, *Social Justice* (Oxford: Clarendon Press, 1976) at 62.

14. Kelsen, *supra* note 5 at 81.

15. William D. Ross, *The Right and the Good*, 2nd ed. (Oxford: Clarendon Press, 2002) at 48-56.

the mother the beneficiary, but not the right-holder.¹⁶ In other words, the choice theory captures an intuition that escapes the interest theory: if a substantive degree of discretion is granted to the duty-holder as to the execution of the duty and, consequently, the beneficiary holds no power to enforce the duty, we are less inclined to speak of a right being held. Conversely, the more discretion granted to the putative right-holder at the expense of the duty-holder, the more we perceive the former as holding a right. However, the focus placed on discretion (or control over the duty) is not only an asset but also a serious challenge for the choice theory.

Hart, the most prominent advocate of the choice theory, argues that an important feature of rights as understood under the choice theory is the right-holder's ability to waive the duty and release from obligation.¹⁷ However, in numerous cases we do, in fact, recognize rights that do not include the right-holder's power to waive the correlative duty. Kant talks about inalienable rights, which one "cannot give up even if he wishes to."¹⁸ Indeed, these are often occasions where the rights under consideration are the most valuable for the right-holder's interest. So valuable, in fact, that we are not willing to grant even the right-holder the power to waive the duty. It is true that we do not, in these cases, grant the duty-holder the discretion whether he will supply the goods or not. But discretion is not a zero-sum phenomenon. We normally argue that children have not only a right, but also a duty, to receive education. And yet, this duty does not require altering our conclusion that a right to education is, in fact, a right. Similarly, an employee cannot release her employer from certain duties through the employment contract.¹⁹ The paradox is, therefore, that according to the choice theory, strengthening rights in a manner that lessens control over them would supposedly move them "outside the genus of rights."²⁰

Another critique of the choice theory addresses the way the theory places rights within the social context. It may be suggested that, if the interest theory relies too much on social facts, the choice theory seems to ignore the impact that rights have on policy and legislation.²¹ According to the choice theory, the existence of a right

16. H.L.A. Hart, "Are there any Natural Rights?" in J. Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 77 at 81; and see similarly Miller, *supra* note 13 at 62; Patrick Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford: Clarendon Press, 1995) at 355. However, cf. Raz's reply in "Rights and Individual Well-Being" in *Ethics in the Public Domain*, 2nd ed. (Oxford: Clarendon Press, 1994) 44 at 50.

17. Hart, *supra* note 16 at 81; Hart, *supra* note 12 at 192. For a (problematic) implementation of choice theory to workfare see Guy Standing, *Global Labour Flexibility* (Basingstoke: Macmillan, 1999) at 317.

18. Immanuel Kant's essay, "This may be true in theory, but it does not apply in practice" cited in Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986) at 258.

19. *The Employment Rights Act* (U.K.), 1996, c. 18 [E.R.A.], and the *Trade Union and Labour Relations (Consolidation) Act* (U.K.), 1992, c. 52 [T.U.L.R.C.A.] are two key statutes guaranteeing a "floor of rights" from which "any provision in an agreement is void in so far as it purports to" derogate from the rights granted under the relevant acts. See E.R.A. s. 203(1); T.U.L.R.C.A., s. 288. See also *Bowmaker Ltd v. Tabor*, [1941] 2 All E.R. 72 at 76 (C.A.).

20. Neil MacCormick, "Rights in Legislation" in Hacker & Raz, *supra* note 9 at 195.

21. Ronald Dworkin, *Taking Rights Seriously*, 2nd ed. (London: Duckworth, 1978) at 365-66; Raz, *supra* note 6 at 166; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 205.

seems to depend on legalistic grounds such as the ability to waive the duty. Interestingly, Hart senses this difficulty and indicates that there is a problem in applying the choice theory to constitutionally recognized fundamental rights. He ends his essay with an extraordinary caveat, according to which “instead of a general analytical and explanatory theory covering the whole field of legal rights I have provided a general theory . . . which is satisfactory only at one level—the level of the lawyer concerned with the working of ‘ordinary’ [private APF] law.”²² Other choice theorists followed this qualification.²³

But, more importantly for present purposes, Hart insisted that the right to welfare is comprehensible within the choice theory. Now, undoubtedly, if recognized as a right, it should be seen as a fundamental, constitutional right against the state. Hart makes an effort to avert this difficulty with what he admits to be a problematic suggestion: that the right to welfare is identifiable under the choice theory since an individual may demand it or, though entitled, decide not to demand it. But, of course, this rejoinder would be equally applicable to other fundamental rights (e.g., speech, religion, equality) as well. The problem for Hart lies elsewhere, to wit—in the choice theory’s inability to take due account of the role that fundamental rights have in practical reasoning. Rights are not recognized or denied because the individual has a certain power (e.g., to waive the duty), but rather because it is deemed just that she hold the right. The power to control the incidence of the duty derives from the assertion that the right exists, not vice-versa.

iii) Interest Theory and Choice Theory the Synergy: Where does this analysis lead? Neither the interest theory nor the choice theory manages to fully explain the concept of legal rights in a manner that would allow one to extract a clear criterion for distinguishing absolute duties from relative duties. Though it is not my purpose to offer here a full-fledged list of criteria, a synthesis that focuses only on the stronger points of both theories would allow moving to questions of analysis and implementation: the interest theory provides the substantive element, while the factors focused on by the choice theory provide helpful evidentiary indication. This hierarchy incorporates fundamental, constitutional rights into the structure that, as Hart conceded, does not agree naturally with the choice theory.

The ability to waive the duty is indeed, in many cases, an important *attribute* of a right, a consequence of it. So much so, in fact, that such power serves as evidence for the existence of a right. The converse, however, as we saw, is not true. Control over the incidence of the duty is a sufficient, but not a necessary, condition of a right.²⁴ Indeed, courts often decide whether a right exists (by ascertaining who

22. Hart, *supra* note 12 at 201.

23. E.g., Nigel Simmonds, “Rights at the Cutting Edge” in *A Debate Over Rights*, *supra* note 4 at 141-44; see also Nicholas Bamforth, “Hohfeldian Rights and Public Law” in Kramer, *Rights, Wrongs and Responsibilities*, *supra* note 4 at 1.

24. I use “condition” here very loosely since, as indicated, control over the duty is actually a *consequence* of a right and therefore cannot logically be its condition. Kramer states that one’s competency to waive enforcement is neither a sufficient nor a necessary condition of holding a right. However, his only example of such a case (the right to be betrayed) is not only bizarre, but also far from convincing. See Kramer, *Rights Wrongs and Responsibilities*, *supra* note 4 at 98. For a critique see Hillel Steiner, “Working Rights” in *A Debate Over Rights*, *supra* note 4 at 296.

the statute is to benefit) primarily in order to decide whether the putative right-holder has control over the duty, not the other way around.²⁵ In such cases the courts stated that a right is recognized if the reason for the duty was that it would *protect the interests of the plaintiff*. This position is parallel to the formulation offered by the interest theory.²⁶ Legislation that incidentally benefits individuals for reasons other than their own interest will not be seen as conferring rights. So if a right to education were explained solely by its contribution to the GNP, children would not hold a right to education at all.

This, however, leaves intact some of the critiques highlighted earlier. The main thrust of the interest theory's analysis of rights and duties suggests a strong relation between legal analysis and social and ideological facts as well as a danger that rights-discourse would be supplanted with a construction that views rights as dependent on duties. This threat is arguably realized in the novel construction of contractual rights.

B. Rights, Reciprocity and Collective Interests

The claim that the idea of contractual rights is "novel" should be immediately qualified. Rousseau insisted that justice could be achieved only by uniting rights and duties.²⁷ Similarly, John Finnis mentions that in certain African tribal regimes, "right" and "duty" are terms covered by a single word, normally translated as "ought" or "due." Finnis explains that this phenomenon has its cultural source in the approach that emphasizes "duty and obligation, rather than the nuance of modern Western society, with a stress on rights."²⁸ So, instead of claiming that the ideas themselves are in any way novel, it would be more accurate to state that it is their prominence in modern, Western legal and political thought that deserves investigation. Where, then, lies the explanation for the rise of this agenda? In social, political and philosophical discourse, the influence of conservative communitarian scholars has been acknowledged.²⁹

Communitarians have been advancing the claim that "rights presume responsibilities" for over a decade.³⁰ In addition, communitarian theory places a strong emphasis on reciprocity.³¹ Indeed, communitarian arguments that focus on social and cultural "problems" have been incorporated in suggestions for welfare reform.

25. *Butler v. Fife Coal Co.* (1912), [1912] A.C. 149 at 165 (H.L.); *Philips v. Britannia* (1923), [1923] 2 K.B. 832 at 841 (C.A.); *Cutler v. Wandsworth* (1949), [1949] AC 398 at 416-17 (H.L.).

26. Raz, *supra* note 6 at 166. Also in Alan Gewirth, *The Community of Rights* (Chicago, IL: University of Chicago Press, 1996) at 8-12.

27. J.J. Rousseau, *The Social Contract* (Hertfordshire: Wordsworth Ware, 1998) at II.vi; see ch. 3.A.3.

28. Max Gluckman, cited in Finnis, *supra* note 21 at 209.

29. Ruth Levitas, *The Inclusive Society?* (Basingstoke: Macmillan, 1998) at 122-25. The communitarian church is a big one. Philip Selznick, for example, shares some communitarian tenets while placing a stronger emphasis on the aim of social justice. See his "Social Justice: A Communitarian Perspective" in Amitai Etzioni, ed., *The Essential Communitarian Reader* (Oxford: Rowman and Littlefield, 1998) at 61; also Alan Gewirth, *supra* note 26 at 6-8.

30. Amitai Etzioni, *The Spirit of the Community* (London: Fontana, 1995) at 9-10.

31. *Ibid.* at 24; Michael Freeden, "The Ideology of New Labour" (1999) Pol. Q. 42 at 45-49; Jamie Peck & Nikolas Theodore, "Beyond Employability" (2000) 24 Cambridge J. Econ. 729.

Lawrence Mead, for example, argues that civic virtue and civic behavior can be achieved also through the welfare system of rights and obligations.³² Amongst important obligations he names the duty to support one's family, to stay in school and to learn English.³³ And Frank Field, while discussing "the breakdown of a contract" within the analysis of welfare reform, declares that "all societies require a shared ideology, containing an agreed moral framework."³⁴

This claim is part of a larger argument in favor of reciprocity. In fact, Field, like other progressive welfare reformers, identified a problem that is separate from that of fiscal and moral issues already mentioned. It is a "legitimacy crisis,"³⁵ the dropping support and political legitimacy for income provision. Saving the system, it is argued, can be done only if the tax paying public can identify with the people whom they are supporting. And this objective entails enhancing reciprocity and strict work requirements. This argument, however, seems to rely more on intuition than on empirical data. In fact, it has been shown that such requirements encourage a perception of "us and them" and undermine "a principle of citizenship, which is that everybody should be treated on an inclusive, equal basis."³⁶

Making rights conditional upon duties, however problematic, is not an uncommon legal phenomenon. But linking rights to responsibilities through a "vague sense of reciprocity"³⁷ allows institutions to set conditions on rights that are unjust and thus constitutes a further threat to the role rights should hold in practical reasoning. Hence, social and economic rights may be demanded and received under a communitarian paradigm,³⁸ but they may also be conditioned on the duty to refrain from asocial behavior or to exhibit an appropriate attitude. Thus, Hillel Steiner (though not a communitarian) asserts that we find it absurd that a person may request leniency on account of him being an orphan after killing his parents because "the set of entitlements should reflect the requirement that persons be held *responsible* for the adverse consequences of their own actions."³⁹

But if the phrase "set of entitlements" is to indicate the total array of *rights* (Steiner uses rights and entitlements interchangeably in his essay) that the individual is endowed with, this would seem an untenable statement. It would be a harsh position to take if one were to say, even about a person who has committed such a heinous crime, that he has thus waived his rights to counsel, to due process, to freedom of speech and so forth. More tenable, then, would be to claim that *particular*

32. Lawrence Mead, *Beyond Entitlement* (London: Free Press, 1986) at 87.

33. *Ibid.* at 242-43. Also, see similarly E. Wynne, *Social Security* (Boulder, CO: Westview Press, 1980) at 142.

34. Frank Field, *Making Welfare Work* (London: Institute of Community Studies, 1995) at 26. Field, former Minister of Welfare Reform, was described as the "most forceful advocate of the moral dimension to social citizenship in recent years": Harris, *supra* note 2 at 29.

35. Standing, *supra* note 17 at 229; also Pierre Rosanvallon, *The New Social Question* (Princeton, NJ: Princeton University Press, 2000) at 43.

36. Standing, *supra* note 17 at 326.

37. Etzioni, *supra* note 30 at 145.

38. Mary Ann Glendon, *Rights Talk* (New York: Free Press, 1991) at 76-108; Selznick, *supra* note 29.

39. Hillel Steiner, "Choice and Circumstance" in Kramer, *Rights, Wrongs and Responsibilities*, *supra* note 4 at 226.

entitlements, more germane to the act itself, may be affected. Thus, what may be considered is that the individual's active role in bringing about his orphanhood may mitigate (though, I would argue, not necessarily nullify) his entitlement to leniency. But it should be noted that though the *decision maker* may consider the individual's responsibility, the *right to request leniency* (if such a right exists) should not be impacted. And herein lies the flaw in Steiner's argument. It is quite peculiar that Steiner, as a choice theorist,⁴⁰ suggested leniency as an entitlement that may be affected. For leniency, as an act that cannot be demanded or waived at will, does not figure in a choice theorist's conceptualization of rights (and for good reason) and thus does not support the general claim that responsibility has an impact on entitlements. It is thus submitted that precisely because there is no *right* to (extra-legal) leniency, the decision maker may reasonably take into account, *inter alia*, a person's behavior and responsibility.

This discussion brings us back to the jurisprudential analysis that ended the previous section. It has been suggested that the interest theory as presented by Raz and MacCormick leads to a situation whereby "rights become illusory" since rights would "extend only to the point where our actions ceased to make a contribution to the collective project."⁴¹ Since the interest theory offers a better understanding of the concept of rights, and since we shall soon turn to inspect precisely similar charges that convey a sense of diluted rights, it is of import to investigate whether this critique points to a key explanation. Nigel Simmonds points out that under Raz's scheme, a right is an interest that justifies holding others to a duty, and that conclusion is reached only "if not counteracted by conflicting considerations."⁴² MacCormick, similarly, is understood to offer a concept of a right that serves as a place holder for forms of protection, but those should be "balanced against countervailing considerations, so that the protections that finally result are the outcome of this calculus of conflicting interest."⁴³ In short, it is argued by choice theorists that rights under the interest theory cannot be entrusted with the task of protecting the individual's sphere of autonomy against desirable social goals because these goals are incorporated in the right itself.

If accepted, this is a serious charge. I would suggest, however, that even if the interest theory grants the interest of other people (or society in general)⁴⁴ a role in grounding rights, this does not require that "the rights or the interests of right-holders play no *strategic* role in moral and political affairs."⁴⁵ Such a claim ignores a necessary separation between two phases of investigation. In the first phase rights are recognized and acknowledged. At this phase, rights are seen as legal rules that exclude certain considerations that would have been relevant were we required to make a "particularistic"⁴⁶ decision, that is a decision that has no regard for the legal

40. Steiner, *supra* note 24 at 233.

41. Simmonds, *supra* note 23 at 113, 145. For a similar critique see Joseph Chan, "Raz on Liberal Rights and Common Goods" (1995) 15 Oxford J. Legal Stud. 15.

42. Raz, *supra* note 6 at 171.

43. Simmonds, *supra* note 23 at 160, criticizing MacCormick, *supra* note 20.

44. Raz, *supra* note 16 at 52, n. 55.

45. Chan, *supra* note 41 at 29.

46. Frederick Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991) at 77-78.

rule. As Fredrick Schauer shows, rules are not subject to “continuous malleability.” They create a temporal gap between the moment of crafting and the moment of applying rights to a particular situation, thus “resisting current efforts to mould them to the needs of the instant.”⁴⁷ Recognition of a certain right changes the balance of reasons (absent the right).⁴⁸ Thus, once the right to privacy is recognized, it would not be helpful to argue, or even to prove, that crime would be reduced if cameras were placed in every person’s home. Of course, this does not mean that rights prevail all things considered. Such a conclusion would require viewing all rights as absolute. This cannot be true, if only because rights conflict amongst themselves (consider the right to free speech and the right not to be defamed).

Rights do, however, place restrictions on measures that can be taken. This is done at the second stage. At this stage the right is given its proper weight and value in the particular context. Different cases will be affected by particular rights in different ways. Though the right may seem to take account of collective interests yet again, their place in the analysis is now distinct. Once recognized, rights have an a-contextual force that may pull towards decisions where “no other political aim is served and some political aim is disserved thereby.”⁴⁹ It is true that the (first stage) process of recognizing rights also takes into account social goals, but this would not render the second stage analysis superfluous. For if it were found that the public interest would be served by recognizing an individual right to freedom of religion, the *particular* balance that should be reached when this freedom is confronted with a collective interest in, say, public order, is not predefined. The right now stands on its own, somewhat oblivious to its parentage.

This is, it should be acknowledged, a narrow escape from a serious charge. For though it is possible to insist on this strict separation between the two stages, Simmond’s argument could, at the very least, be understood to proclaim that interest theory jurisprudence is much more *vulnerable* to a diluted idea of rights, one that has more room for incorporating the common good at distinct stages (such as identification and balancing). Simmonds is right to point out that under the interest theory’s own “terms of engagement,” a significant degree of “semantic autonomy” is compromised if identifying the right-holder depends on the purpose supposedly served by the law.⁵⁰ Such a procedure would necessitate “an unavoidable embrace of a conception of the ‘good’.”⁵¹ This is not an insignificant cost to pay in any sort of analysis, especially if one thinks that the criterion for identifying a concept should ideally be independent of the criteria for assessing its goodness or badness. But the moral and social weight attached to rights, their “familiar role in ordinary thinking,”⁵²

47. *Ibid.* at 81-84.

48. Joseph Raz, *Practical Reasons and Norms* (Oxford: Clarendon Press, 1975) at 39.

49. Ronald Dworkin, *supra* note 21 at 91; Alon Harel, “What Demands are Rights?” (1997) 17 Oxford J. Legal Stud. 101 at 111.

50. Simmonds, *supra* note 23 at 197. Kramer states that “one scarcely should be surprised by the general fact that we have to interpret each norm before we can decide who (if anyone) holds right under it”: Kramer, *supra* note 4 at 85.

51. Steiner, *supra* note 24 at 293.

52. *Ibid.* at 236-37; Raz similarly emphasizes the importance of following “the usage of writers on law, politics and morality who typically use the term”: Joseph Raz, “On the Nature of Rights” (1984) 93 Mind 194.

requires that an account of collective interests be taken both in the first (identification) and in the second (balancing) stages.

However, as argued above, the moral autonomy enjoyed by the choice theory, which Simmonds favors, comes with a price-tag of its own. The beneficial detachment, or value neutrality, of the choice theory is possible only by tying the substantive question (who is a right-holder?) to a procedural question (who may enforce a right?). Such a prerequisite seems far more problematic than the one confronting the interest theory. The worlds of substantive rights and procedural enforcement are governed by two different sets of values. One cannot tie the former so rigidly to the latter and still avoid problematic conclusions. And yet, following Simmonds' arguments, we should be aware of the possible social, legal and political implications of working within the interest theory. We are now in a position to understand how this insight is manifested insofar as welfare rights and welfare reform are concerned.

C. Constructing Welfare Rights as Conditional

Both proponents and opponents of welfare reform accept that recognizing a legal right to welfare would limit the conditions that may be attached to welfare benefits.⁵³ Thus, when the American administration of welfare relief sought to reduce expenses on welfare relief by enhancing its "deterrent effect," it was suggested that waiting periods be extended to create a backlog to discourage applicants from applying; that welfare centers be consolidated into smaller offices; and that new applicants be routinely required to frequent the employment agency. These procedures, it was clear, could be implemented only if the present system would be "more selective in offering welfare as a right."⁵⁴ This insight should not be dismissed as mere policy jargon. Indeed, Lucy Williams rightly links the power to attach conditions to benefits with (lack of) a right to AFDC payments that was expressed unequivocally in federal law. To permit behavioral conditions on eligibility, she explains, the United States Department of Health and Human Services had to waive the entitlement provisions under 42 U.S.C. §1315.⁵⁵ And later she argues correctly that "the importance of the PRWORA [Personal Responsibility and Work Reconciliation Act 1996 APF] is its repudiation of the concept of entitlement in welfare jurisprudence."⁵⁶ Notwithstanding their important policy and doctrinal implications, these claims also rest on a sound jurisprudential base. Steiner states that the job of rights is

to demarcate *domains*-spheres of practical choice within which the choices made by designated individuals (and groups) must not be subject to interference-and to specify

53. Mead, *supra* note 32 at 2, 9, 206; Wynne, *supra* note 33 at 145; L.A. Sobel, ed., *Welfare and the Poor* (New York: Facts on File, 1977) at 122-24 cited in Mead, *supra* note 32 at 119.

54. *Budget Bureau Recommendations for Savings in the Welfare Budget*, cited in Francis Piven & Richard Cloward, *Regulating the Poor*, updated ed. (New York: Vintage, 1993) at 161, n. 20.

55. Lucy Williams, "The Ideology of Division: Behavior Modification Welfare Reform Proposals" (1992) 102 Yale L.J. 719 at 721; Lucy Williams, "The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard" (1994) 12 Yale L. & Pol'y Rev. 8.

56. Lucy Williams, "Welfare and Legal Entitlements: The Social Roots of Poverty" in D. Kairys, ed., *The Politics of Law*, 3rd ed. (New York: Basic Books, 1998) 569 at 570.

those demarcations without reference to the content of the choices to be made within those spheres. It thus requires no very extended argument to show that rights, so conceived, amount to *normative allocations of freedom*.⁵⁷

Rights function as a form of legal immunity that bears on government's ability to attach conditions and thus to limit access to them. Advocates of current programs repeatedly make the (mistaken, as we shall see) assertion that recognizing such a right would forbid attaching *any* conditions to benefits at all. A more detailed discussion of the conditions that may be placed on benefits that are not rights will be offered in the following section. The current section outlines the manner in which welfare interests are *constructed* as conditional upon fulfillment of duties, and suggests that certain problematic policies are a direct consequence of this construction.

A couple of potential confusions need to be avoided. First, it might be thought that underlying the argument just described lies an agenda for a universal, unconditional basic income grant. This need not be the case. Conditions for eligibility that refer to one's immutable status (such as age or disability), analysis of which falls beyond the ambit of this paper, may be placed without giving rise to the issue of preconditioning entitlements on behavior (though, of course, this does not mean that they are less problematic). Second, a critique of the rights-responsibility fusion may be seen as identical to the claim that the right to welfare is an *absolute* right. Now, very few rights can be claimed to be of absolute value,⁵⁸ and it is certainly not maintained here that the right to receive welfare benefits is one of them. The two possible confusions are linked, it seems, as some writers refer to a lack of a behavioral precondition to eligibility as a sign that a right is an absolute right. By this standard, of course, almost all rights (that are not burdened by behavioral conditions) are absolute, and welfare rights would (currently) be in a small minority. We investigate here, therefore, how modern welfare reform managed to infuse behavioral requirements as conditions that are independent of and precedent to welfare claims.⁵⁹

Linking Duties to Rights

It is widely acknowledged that the new welfare-to-work regime represents a "fundamental change in the balance between rights and obligations in the provision of assistance."⁶⁰ Alan Gewirth suggests that "positive rights *require* personal

57. Steiner, *supra* note 24 at 238. Hart views rights as "legally protected choices" and tends to regard constitutional rights as primarily creating immunities: Hart, *supra* note 12 at 197.

58. Freedom from torture and freedom of thought are two examples. For a discussion regarding the illusory quality of absoluteness see Glendon, *supra* note 38 at 18-46.

59. Peter Vincent-Jones, "Contractual Governance: Institutional and Organizational Analysis" (2000) 20 Oxford J. Legal Stud. 317 at 347.

60. Fafo Institute for Applied Social Science, *Workfare in Six European Nations* (Oslo: Norwegian Ministry of Health and Social Affairs, 2001) at 46, cited in Joel Handler, *Social Citizenship and Workfare in the US and Western Europe* (Cambridge: Cambridge University Press, 2004) at 144; Also Chris Jones & Tony Novak, *Poverty, Welfare and the Disciplinary State* (London: Routledge, 1999) at 143; Mead, *supra* note 32.

responsibility on the part of the would-be recipients of help.”⁶¹ Anthony Giddens follows in similar vein, envisaging no less than “a redefinition of rights and responsibilities.” Giddens condemns “old style democracy” for treating rights as “unconditional claims” and asserts that “unemployment benefits should carry the obligation to search for work, for example.”⁶² Giddens is sensitive to the charge that welfare rights have been singled out in this construction, and makes clear that as “an ethical principle ‘no rights without responsibilities’ must apply not only to welfare recipients, but to everyone . . . otherwise the precept will be held to apply only to the poor or to the needy.”⁶³

However, it would be interesting to see how the argument that there are “no rights without responsibilities” would truly be relevant to individuals who are not poor or needy. In non-legal discourse, one may understand the notion that “rights presume responsibilities” to resemble the idea of *noblesse oblige*, that inordinate privilege, wealth or power should motivate an urge to “repay” society. But this is not the meaning usually attributed to the doctrine of “rights and responsibilities.”⁶⁴

It seems that there is good reason that neither Giddens nor Gewirth supply us with a parallel example involving a more established right (e.g., speech, privacy, political participation) that is contingent upon fulfillment of duties. It is difficult to conjure up such a sentence. “Freedom of religion should carry the obligation to . . .” what? One cannot finish this clause by stating something along the lines of “avoid harm to others.” Such a claim would simply state the *limits* of the right, not the behavioral conditions for eligibility. We do not say that one has a right to free speech only if she refrains from drug abuse any more than we say that one loses his right to property if he lies on his tax statement. Contrariwise, established rights were declared inalienable, natural, sacred and equally deriving from one’s personhood. If Giddens claims that a different construction for *all* rights is warranted it would be a dramatic suggestion indeed, a “reformulation of the social contract.”⁶⁵

As an example that shows how this paradigm is being implemented in realms other than welfare provision, it has been judicially suggested that prisoners should lose their right to vote because committing a crime is tantamount to violating “civic responsibility . . . which safeguards the social contract.”⁶⁶ This conclusion rejects the need for a rational link between the act and the punishment and thus rests on a general paradigm that sees rights as contingent upon fulfillment of obligations. It resonates with Steiner’s suggestion, discussed above, that one’s entitlements should reflect her actions. It also employs the concept of the social contract in a manner that restricts, rather than expands, access to entitlements. However, for rea-

61. Gewirth, *supra* note 26 at 42 [emphasis added]. Gewirth explains how the unfairness of receiving “something for nothing” supports a duty to work at 223, 231-35. This position is somewhat softened elsewhere in the book at 121.

62. Anthony Giddens, *The Third Way* (Cambridge: Polity Press, 1998) at 65.

63. *Ibid.* at 65-66.

64. Brian Barry, *Why Social Justice Matters* (Cambridge: Polity Press, 2005) at 144-51.

65. Rosanvallon, *supra* note 35 at 28.

66. *Sauve v. Attorney General of Canada (No 2)*, [2002] 3 S.C.R. 519 at 570 (Gonthier J., minority opinion). For similar remarks on this matter see *Belczowski v. The Queen* (1992), 90 D.L.R. (4th) 330 at 336; *Richardson v. Ramirez*, 418 U.S. 24 (1974); *Hirst v. United Kingdom (No 2)* (2004) 38 E.H.R.R. 40 para 33 [Hirst]; see Barry, *supra* note 64 at 102.

sons explained in the following section, conditions on rights unrelated to the benefit may “curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.”⁶⁷ Requirements of germaneness and equality are circumvented when the contract mechanism is “being used increasingly in the regulation of social relations between citizens and the state.”⁶⁸

As is well known, behavioral conditions existed in post-Poor Law programs prior to recent reforms. But the British “actively seeking work” criterion lapsed after less than a decade, and that the conditions placed on benefits in the United States in 1967 required further legislation to overcome administrative unease about enforcement. Indeed, the Special Task Force to the Secretary of Health, Education and Welfare wrote in 1971: “It is not even clear that anyone other than the mother has the legal or moral right to make that decision [whether or not to accept a job offer—APF] or that anyone other than the mother can make the decision that is best for her and her children.”⁶⁹ Arguably, the reservation from such conditions was attributed to a serious regard for equal citizenship and welfare rights. Since rights, if taken seriously, limit the conditions that may be placed between the individual and the interest that the right serves, efforts to instantiate harsh conditions had to be quickly abandoned.

Welfare reforms since 1980, however, do not encounter similar obstacles. Years of small austerity measures and changes in program eligibility have made a cumulative impact that shifted the post-war emphasis on universal entitlement towards an adoption of reciprocity as the unifying, central principle of social welfare and have transformed welfare rights (and perhaps social rights in general) to “negotiated claims.”⁷⁰ Governments have been “trying to reconstruct social exchange on an increasingly individualistic basis, implementing a contractual reciprocity on a territorial level, and leaving aside universal rights.”⁷¹ When announcing the new Jobseeker’s Allowance policy, the British government stressed the link between the right to benefits and claimants’ responsibilities, and stated that the latter would take concrete form in the obligation to take up work.⁷² Emphasis was placed on fulfillment of duties as a precondition to welfare rights while the government “reformulated welfare as mutual individual responsibility.”⁷³ This curtailment of the social citizenship ideal is detected both in American and in British welfare reform,⁷⁴ and

67. Hirst, *supra* note 66.

68. Vincent-Jones, *supra* note 59 at 319.

69. Cited in Gewirth, *supra* note 26 at 128, n. 27.

70. Robert Cox, “The Consequences of Welfare Reform” (1998) 27 J. Soc. Pol’y 1 at 12; see A. Wax, “Something for Nothing” (2003) 52 Emory L.J. 1 at 3.

71. Giovanna Procacci, “Against Exclusion” in M. Rhodes & Y. Meny, eds., *The Future of European Welfare: A New Social Contract?* (Basingstoke: Macmillan, 1998) 63 at 74.

72. *A New Contract for Welfare: Gateway to Work* (Cm 4102, 1998); Alex Bryson, “The Jobseeker’s Allowance: Help or Hindrance to the Unemployed?” (1995) 24 Indus. L.J. 204.

73. Freedman, *supra* note 31 at 49. The Labour Commission on Social Justice rejected the idea of an unconditional basic income and preferred a model that offered an “ethic of mutuality” that had at its centre “a balancing of rights and responsibilities”: *Social Justice Strategies for National Renewal* (London: Vintage, 1994) at 232; Peter Dwyer, *Welfare Rights and Responsibilities* (Bristol: Policy Press, 2000) at 5-8; Harris, *supra* note 2 at 28.

74. Jones & Novak, *supra* note 60 at 195-96; Julian Fullbrook, “The Jobseekers Act 1995” (1995) 24 Indus. L.J. 395. Even prior to the *Job Seekers Act [J.S.A.]*, John Major’s *Citizen’s Charter* stated that “citizenship is about our responsibilities, as well as our entitlements”: Cabinet Office *The Citizen’s Charter* (Cm 1599, 1991).

has led social security law scholars to ask if the welfare state should be seen as merely a phase in the evolution of social policy, and one which is nearing conclusion.⁷⁵ Stuart White identifies the contractual paradigm as the dominant theme in both American and British welfare reform:

... access to welfare benefits is one side of a contract between citizen and community which has its reverse side various responsibilities that the individual citizen is obliged to meet; as a condition of eligibility for welfare benefits, the state may legitimately enforce these responsibilities, which centrally include the responsibility to work.⁷⁶

White realizes that welfare contractualism violates the traditional understanding that rights “have the quality of unconditionality”⁷⁷, where “unconditionality” implies that *access* to the rights is not conditional upon fulfillment of responsibilities. Though he avoids the implications of this new construction in the ensuing discussion, it is important to note that this construction is not only theoretically striking, but that it also affects the conditions that may be legitimately placed on benefits.

The Consequences of Conditionality

It has been argued that this construction of welfare rights as conditional has led welfare debates to be conducted and decided as matters of policy⁷⁸ or politics⁷⁹ rather than rights. However, these realms are not usually seen to exclude consideration of rights. On the contrary, principles establishing rights “may be among the fundamental principles governing all political action.”⁸⁰ So what seems to underlie this concern is that debates over welfare reform are held without granting weight to considerations that should emanate from rights such as the right to welfare and the right to work.⁸¹ This is done, I suggest, by embracing a “more discursive view of rights . . . rather than by appeal to fixed principles.”⁸² Hence, welfare rights do not figure as an independent consideration that should have an effect on policy decisions, but rather as a *reflection* of the policy, or philosophy, already established. Welfare rights reflect the balance of interests instead of having a significant impact on this balance. For example, it has been argued that the “entitlement on which the right is based falls within a calculation of reciprocity and compensation. Thus, the disabled veteran or the war widow can be said to have a claim on society since

75. Harris, *supra* note 2 at 3.

76. Stuart White, “Social Rights and the Social Contract” (2000) 30 British J. Pol. Science 507.

77. *Ibid.* 509.

78. Keith Puttick, “Social Security 2020: A Welfare Odyssey—A Commentary on Principles into Practice and the Reform Programme” (1999) 29 Indus. L.J. 190 at 195.

79. Joel Handler, *The Poverty of Welfare Reform* (New Haven, CN: Yale University Press, 1995) at 94.

80. Raz, *supra* note 6 at 217. Also, Ronald Dworkin, “Rights as Trumps” in Waldron, *supra* note 16 at 153.

81. This is also made clear by the fact that the most important decisions protecting recipients have centered on the violation of other established rights, such as freedom of religion (*Sherbert v. Verner* 374 U.S. 398 (1963) [*Sherbert*]) or freedom of movement (*Shapiro v. Thompson* 394 U.S. 618 (1969)).

82. Cox, *supra* note 70 at 10.

they have, in fact, given something for it.”⁸³ It may be implied here, then, that a needs-based claim (due to disability or poverty) would be weakened if nothing would have been given in return.

Ronald Dworkin views this “balancing” model as “indefensible” since it “*threatens to destroy the concept of individual rights*.”⁸⁴ The European Court of Justice reached a very similar conclusion. The ECJ stated that British legislation that made the right to paid annual leave conditional upon 13 weeks of employment with the same employer amounts to an impermissible precondition on access to the right:

although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, *Member States are not entitled to make the existence of that right, which derives directly from Directive 93/104, subject to any pre-conditions whatsoever*.⁸⁵

The contractual discourse manages to create a unique “is-ought” reposition, namely: “if this *is* what policy makers have decided to demand from beneficiaries, it is doubtless what *ought* to be demanded from them. This is, ex hypothesis, what their welfare rights entail.” Instead of operating in an a-contextual, rule-like mode, welfare rights operate in a “variable, contextual, particularistic manner.”⁸⁶ This position, if left unchallenged, would leave the use of rights “conceptually redundant.”⁸⁷ It has been suggested that this reconfiguration of rights reflects on the concept of social citizenship itself, which is comparably changed “from status to contract”⁸⁸ and, more ominously, that once rights “lose their unconditional quality, the door is open not just for the invisible hand of the market . . . but above all for the visible hand of rulers who tell people what to do when.”⁸⁹

It is noted that this modification also bears on the possibility of external (judicial or other) review. Richard Epstein suggests, and proceeds to deny, that the logical conclusion of a contractual construction of welfare programs is that they are beyond review.⁹⁰ Epstein’s suggestion, however, is more convincing than his rebuttal. If benefits are understood simply as a contract between the state and (some of) its citizens, how can any external criteria be relevant? The state offers the benefits, and the potential beneficiary may accept or reject them, along with the conditions attached. And, indeed, Mead candidly states that

both states and recipients . . . need not accept the grants, but neither may they demand

83. Rosanvallon, *supra* note 35 at 79.

84. Dworkin, *supra* note 21 at 199 [emphasis added]. See also page 92.

85. Case C-173/99 *BECTU v. DTI* [2001] E.C.R.I. 4881 [53] [emphasis added]; see Hugh Collins, K.D. Ewing & Aileen McColgan, *Labour Law Text and Materials* (Oxford: Hart, 2001) at 399-403.

86. Harel, *supra* note 49 at 111.

87. Kenneth Campbell, *The Concept of Rights* (D. Phil. thesis, Oxford, 1979) [unpublished] at 74.

88. Handler, *supra* note 60 at 203.

89. Ralph Dahrendorf, “The Changing Quality of Citizenship” in B. van Steenberg, ed., *The Condition of Citizenship* (London: Sage, 1994) 10 at 13.

90. Richard Epstein, “The Uncertain Quest for Welfare Rights” (1985) B.Y.U. L. Rev. 201 at 212.

them without conditions . . . This strong constitutional position has meant that requirements like work tests are difficult to challenge in court.⁹¹

What we lack, therefore, is a substantive baseline. Market-based negotiations amongst members of the community require only a thin baseline which would not permit enforcing contractual terms that are, for example, illegal, immoral or exploitative to an inordinate degree.⁹² But, a social contract that settles for such a baseline leads to problematic consequences insofar as impoverished members of the community are concerned. Rawls was aware of this problem and sought to remedy it by offering a baseline of substantive equality from which negotiations begin. Gauthier's conceptualization of a thin baseline,⁹³ and Buchanan's affirmation that there is "no necessary basis for any initial agreement" prior to the assignment of rights, both rely on market-based procedures for the construction of morality and rights. From this outset it is natural to conclude that one's entitlement corresponds to her contribution. Moreover, the market-based paradigm would morally permit that those with extensive economic resources may purchase exemptions from social obligations.⁹⁴ It is submitted here that adherence to a traditional conceptualization of rights that derives from values that are unrelated to behavior would yield a different set of conditions than those exhibited in current welfare-to-work programs.

D. Conditioning Rights: A General Perspective

It has been shown that the construction of welfare rights as conditional is not without practical implications. Amongst these implications are the severe conditions that are sometimes placed on welfare benefits, in a manner that affect many rights, in addition to the right to welfare. It is important, therefore, to inquire to what extent *other* rights of welfare claimants may be limited when claimants apply for benefits. This section considers some of the efforts to map a theory of "illegitimate conditions"⁹⁵ insofar as they relate to conditions placed on welfare benefits through welfare-to-work programs. The vast breadth of situations that a doctrine of illegitimate conditions covers could "literally suggest a unifying theory cutting across all of constitutional law."⁹⁶

In effect, *all* rights that are not absolute may be limited upon implementation. Thus, Justice Holmes cleverly asserted that a policeman's discharge for political

91. Mead, *supra* note 32 at 170, n. 71.

92. Atiyah, *supra* note 16 at 265-81, 341-44; Liam Murphy & Thomas Nagel, *The Myth of Ownership* (New York: Oxford University Press, 2002) at 15-16; cf. Miller, *supra* note 3 at 104.

93. David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986) at 203-09. See also Richard Epstein, "Foreword" (1988) 102 Harv. L. Rev. 5 at 98-99.

94. Cox, *supra* note 70 at 12.

95. The terminology is my own. In American jurisprudence the doctrine is termed "unconstitutional conditions".

96. William Marshall, "Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses" (1989) 26 San Diego L. Rev. 243 at 244; Cass Sunstein, in similar vein, remarks that: "anything so general as an unconstitutional conditions doctrine is likely to be quite unhelpful"; Cass Sunstein, "Is There an Unconstitutional Conditions Doctrine" (1989) 26 San Diego L. Rev. 337 at 338.

speech was justified on the grounds that, though he “may have a constitutional right to talk politics . . . he has no constitutional right to be a policeman.”⁹⁷ But the shrewdness cannot obscure the conclusion that, justified or not, the plaintiff was sanctioned for exercising his right to free speech. Hence, an absolute right to free speech, for example, would not allow such sanction, regardless of the plaintiff’s right (or lack thereof) to be a policeman. So we find that even the “classic,” unconditional rights (i.e. not subject to behavioral preconditions), may be conditioned, or limited, when conflicting with other social interests. We may say that the general formulation may be stated as follows:

X is entitled to a benefit (B) subject to condition (C) that relates to his right (R).

The previous section, then, dealt with the weakening of B from a supposed fundamental right (to welfare) to a conditional benefit. And so, the more that B is perceived as conditional the fewer conditions placed upon it are subject to review insofar as the *benefit* is concerned. And yet, what of the other half of the formulation, the unconditional, uncontroversial right (R)? While the entitlement to welfare benefits in itself may permit, arguendo, a wide array of conditions, requiring the claimant to declare that she does not intend to overthrow the government by unlawful means⁹⁸ or to forsake her day of rest⁹⁹ may prove to be an illegitimate restriction on the right to free speech or to freedom of religion, respectively. To make matters clear, we should distinguish the situation under investigation from several similar, but distinct, legal dilemmas.

First, we find the situation where X is entitled to enjoy a right (R1) subject to the condition (C) that relates to *another* right (R2) that he is normally entitled to. Thus, we may imagine a situation in which the right to vote is subjected to a loyalty oath. This situation is distinct from the one under discussion because the doctrine of illegitimate conditions is concerned with areas where a government is *permitted* to act but is *not required* to do so.¹⁰⁰ Contrariwise, in this case, it would be necessary to place under scrutiny *both* the fact that the right to vote is subject to a condition *and* the fact that a loyalty oath is demanded. Indeed, if welfare rights are seen as fundamental legal rights, a similar analysis would have to take place in this case as well. However, if, as in our original formulation, the right R1 is actually a discretionary benefit B, a different range of considerations apply.¹⁰¹

Second, it should be emphasized that when considering conditions (Cs) placed on rights, we are dealing with behavioral conditions. In other words, these are conditions where the individual has a *choice* whether to act in one way or another.¹⁰² So while X’s right (to free speech, to freedom of religion) is under threat, X may

97. *McAuliffe v. Mayor of New Bedford* 29 N.E. 517 (1892).

98. *Speiser v. Randall* 357 U.S. 513 (1958).

99. *Sherbert*, *supra* note 81.

100. Larry Alexander, “Understanding Constitutional Rights in a World of Optional Baselines” (1989) 26 San Diego L. Rev. 175; Kathleen Sullivan, “Unconstitutional Conditions” (1989) 102 Harv. L. Rev. 1413 at 1422.

101. Cf. Peggy Hicks, “Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another” (1980) 66 Iowa L. Rev. 741; William van Alstyne, “The Demise of the Right-Privilege Distinction in Constitutional Law” (1968) 81 Harv. L. Rev. 1439.

102. Sullivan, *supra* note 100 at 1426.

refuse to relinquish the right and thus (if the condition is legal) to forego the benefit related to it. Contrariwise, a benefit granted only to members of a certain race, sex or nationality may be considered by certain accounts to be “conditional” and presumably a violation of an individual’s right to equality and dignity.¹⁰³ In sum, antidiscrimination doctrine is concerned with who you are; unconstitutional conditions doctrine is concerned with what you do.¹⁰⁴ And so, matters concerning the immutable status of individuals, and distinct from their choices, do not figure in the analysis presented here. One may argue that the decisions that welfare claimants are required to make are choices “between the rock and the whirlpool.”¹⁰⁵ For the purpose of the following analysis, however, the physical possibility of making a choice should be a sufficient reason to examine the condition placed on the benefit within the general schema. Indeed, “a choice between evils, however undesirable, is not by itself coercive.”¹⁰⁶

I begin by explaining why the two original attempts to propose a theory for a doctrine of illegitimate conditions, along with a more contemporary approach, contain fundamental flaws that render them inapplicable in any context. I refer to these three as the Greater/Lesser approach, the Direct/Indirect distinction and the Threat/Offer distinction. I then move to discuss the strengths and weaknesses of three other approaches that, though perhaps not compelling in all realms of law, may be utilized when considering the conditioning of welfare benefits. These are the Germaneness requirement, the argument from Equality and the Fundamental Rights consideration.

i) The Greater/Lesser approach: This view is associated with Justice Holmes’ proposition according to which “even in the law the whole generally includes its parts.”¹⁰⁷ This statement conveys the notion that if a state has “absolute arbitrary power”¹⁰⁸ to withhold a social program *in toto*, it stands to reason that it can implement the program under conditions as it sees fit. And, if the alternative to the conditioned program is no program at all, thus making the conditioned-program situation Pareto superior—how can one claim an infringement of rights?¹⁰⁹ The only limits on such conditions would be similar to those which relate to regular contracts such as adherence to the rule of law and to public policy.

The falsehood of this approach, however, lies in its tendency to equate factual situations with legal concepts. In other words, though the whole may include its parts in law as well, the “whole” and the “parts” of *legal power* (regulation, sanctions) are often different from the whole and the parts of the *substance matter* to which the legal power is applied (the workplace, provision of housing, criminal

103. Michael McConnell, “Unconstitutional Conditions” (1989) 26 San Diego L. Rev. 255 at 260.

104. Lynn Baker, “The Prices of Rights” (1989) 75 Cornell L. Rev. 1185 at 1189.

105. *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583 (1926) at 593 [Frost].

106. Sullivan, *supra* note 100 at 1436.

107. *Western Union Telegraph Co v. Kansas*, 216 U.S. 1 at 53 (1910); see also *Davis v. Massachusetts*, 167 U.S. 43 (1897).

108. *Western Union Telegraph*, *supra* note 107 at 54.

109. Richard Posner, *The Economics of Justice* (Cambridge MA: Harvard University Press, 1981) at 54-55.

law). Though the state's decision to withhold (or withdraw) a privilege has a greater impact on a larger number of people (the "substance matter"), the scope of the legal power it uses is actually smaller.¹¹⁰ When the state refrains completely from acting in certain areas (such as social security, welfare, medical aid) and avoids even the regulation of the sphere, the decision will presumably affect a significant population. On the other hand, the more the state regulates the more legal power it actually uses. This is because focused actions have an impact on values that are not touched by omission. Thus, we may not deduce from the state's power not to engage in public employment the right to exclude certain groups from public employment, as only the latter gives rise to issues of equal protection of the law.¹¹¹ And an employer's right to lay off employees in times of financial difficulty has no bearing on her ability to let employees retain their job on condition that wages be cut below minimum wage requirements.¹¹² In these cases the putative "lesser" power has an impact on fundamental values that the supposed "greater" power does not. It is, therefore, a different power that seeks independent justification.¹¹³

ii) The Direct/Indirect distinction: If the previous approach would tend to affirm most conditions placed on benefits, the Direct/Indirect distinction would, if accepted, lead to striking down most of them. The premise of the argument is that if the state is not permitted to directly violate an individual's right, it may not condition a valuable benefit on the requirement that a person would act in a manner that would have the same effect. "It is inconceivable," the United States Supreme Court stated, "that guarantees embedded in the Constitution of the United States may be manipulated out of existence."¹¹⁴ And indeed, if we are not willing to accept criminal sanctions laid upon church goers for abiding their faith, what reason would we have for condoning a more tacit approach, whereby people proclaiming to forego their habits would be offered financial incentives, or people refusing to do so would have their welfare benefits reduced? But it is only the extreme nature of this example that suggests that the theory as a whole seems an attractive one.

A liberal society is highly suspicious of government efforts to criminalize acts that the government would prefer that individuals not undertake. But as the modern welfare state is routinely involved in a wide range of areas, it is evident that it may advance certain values according to a preferable set of priorities. These two assertions create the valuable gap between what the government views as the right way to act and between an individual's right to act in a manner that she sees fit. Therefore, a decision by the Ministry of Culture to promote classical music by offering scholarships to talented young rap artists who are willing to abandon their musical preference and focus on Bach may be problematic to some, but it is distinct

110. Thomas Powell, "The Right to Work for the State" (1916) 16 Colum. L. Rev. 99; J. French "Unconstitutional Conditions" (1962) 50 Geo. L. Rev. 234 at 236-37; Kenneth Simons, "Offers, Threats and Unconstitutional Conditions" (1989) 26 San Diego L. Rev. 289 at 293; Robert Goodin, "Support With Strings" (2004) 21 J. Applied Phil. 297 at 299.

111. Powell, *supra* note 110 at 108-10.

112. John Garvey, "The Powers and the Duties of Government" (1989) 26 San Diego L. Rev. 209.

113. Note, "Unconstitutional Conditions" (1960) 73 Harv. L. Rev. 1595 at 1609; Alexander, *supra* note 100 at 178.

114. *Supra* note 105 at 593-94.

from legislating against rap artists.¹¹⁵ Though it is true that the indirectness of the sanction does not legitimize a condition, the distinction between a direct prohibition and an indirect incentive (or disincentive) is still an important one.

iii) The Threat/Offer distinction: This approach suggests that a proposal that would worsen a person's condition if she declines to accept it should be categorized as a threat, and therefore forbidden; while a proposal that may improve the person's condition if accepted is an offer, and therefore permissible.¹¹⁶ An offer is a positive governmental act because it widens the range of choices open to an individual, while a threat narrows her range of choices.¹¹⁷ But one must ask: improving or worsening an individual's range of choices in relation to what? Kenneth Simons, for example, suggests a baseline test that is based on the action the government would have taken if it had not been permitted to attach the condition to the offer.¹¹⁸ Giving the example of welfare benefits and work requirements, he states:

a work requirement that served as an eligibility condition on government welfare benefits would be considered a pure threat under the unmodified test, unless the government considered the condition so critical that government would drop the welfare program entirely rather than drop the condition.¹¹⁹

The idea to defer to government's *sine qua nons* is unacceptable, however. A criterion for a *normative* baseline cannot be that the government would otherwise abolish a program altogether. The fact that a government would abolish slavery only on the condition that former slaves wear tags so as to enable government to keep track of them does not mean that one should accept the baseline of slavery and move on from there.¹²⁰ A public housing program to poor couples only on condition that they marry is similarly problematic, even if the government adds that it would prefer abolishing the program altogether than condoning cohabitation in sin.

iv) The Germaneness requirement: Why does a fee for a marriage license seem legitimate? Presumably, it is because the requirement is so closely related to the benefit. Is it possible, then, to deduce a general rule, namely: the closer the relationship between the condition and the benefit the better? This is the rationale behind the germaneness requirement. Like the Direct/Indirect approach, this requirement also stems from the fear that rights will be "manipulated out of existence." In comparison, however, the germaneness requirement proposes a legislative check that is more attuned to the context and particularities of public (as distinct from criminal) law. The flexible nature of public law is thus manifested in the formulation: "the more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast . . . trigger closer scrutiny."¹²¹ Two rationales support this approach: a check on the legislative process and a check on state

115. Cf. Seth Kreimer, "Allocational Sanctions" (1983) 132 U. Pa. L. Rev. 1293 at 1301.

116. See, e.g., Simons, *supra* note 110.

117. Kreimer, *supra* note 115.

118. Simons, *supra* note 110 at 312.

119. *Ibid.* at 292.

120. Interestingly, Goodin notes that traditional social contract theorists (Hobbes, Locke and Grotius) justified slavery in very similar terms. See Goodin, *supra* note 110 at 299.

121. Sullivan, *supra* note 100 at 1457.

power. As a check on legislative process, the germaneness condition limits irresponsible (and corrupt) “logrolling” and strategic voting—the practice of trading votes that leads to seemingly irrational conditions, unrelated to the benefits.¹²² As a check on state power, the germaneness requirement limits the range of legitimate conditions that may be attached to benefits and thus controls the range of potential encroachments on fundamental rights. Furthermore, unlike the dichotomous Threat/Offer distinction, the Germaneness requirement does not offer a mechanical test, but rather a rule of thumb, a warning flag that may raise suspicion under certain circumstances. Thus, the implication of the theory is not that germane conditions are inherently benign,¹²³ but rather that they are less likely to be malign.

v) The Argument from Equality: It may be worth rehearsing that a condition that disqualifies persons based on an their immutable characteristic, as opposed to presenting a choice of action, is related to the present discussion by name only.¹²⁴ They are more naturally discussed within the confines of equality and discrimination in the strict sense. Conditions investigated here presume the existence of a choice open before the individual to act in one way or another. What, then, could be the place of equality in this analysis? Kathleen Sullivan, for example, states that all conditions “necessarily discriminate facially between those who do and those who do not comply with the condition.”¹²⁵ In effect, equality meets the illegitimate conditions doctrine at two intersections: the first concerns the distribution of the right and the second concerns the distribution of the benefit.¹²⁶

First, one may argue that all conditions on a certain right are discriminatory, in the sense that they violate the equal distribution of the right (or the sanction) amongst members of the society.¹²⁷ So denying food stamps from striking workers discriminates against workers who are in need and thus cannot afford to strike without the benefit of a safety net.¹²⁸ Access to the right to strike, then, is not distributed equally.

This approach, however, is not unproblematic. When dealing with benefits that have an important economic value, the argument that conditioning rights *indirectly discriminates* between those who “have” and those who “have not” draws the line of economic means. This argument has not gone well with the courts.¹²⁹ It is difficult for the judiciary to quash social programs that, due to *background* economic inequality, will lead to different people being treated differently.¹³⁰ If taken ad absurdum,

122. *Ibid.* 1469-73.

123. Cf. *ibid.* at 1476.

124. For such conditions see Baker, *supra* note 104 at 1189.

125. *Ibid.* 1490-99.

126. Sullivan, *supra* note 100 at 1490-99; Kathleen Sullivan, “Unconstitutional Conditions and the Distribution of Liberty” (1989) 26 San Diego L. Rev. 327 at 331-32. This distinction is sometimes overlooked: McConnell, *supra* note 103 at 259-60.

127. Barry, *supra* note 64 at 152-53.

128. The U.S. Supreme Court did not accept this argument: *Lyng v. International Union, UAW et al.*, 485 U.S. 360 (1988).

129. For two exceptions in the United States see *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) [poll tax struck down] and *McDonald v. Board of Election Commissioners*, 394 U.S. 802 at 807 (1969), where the Court stated in *dictum* that “a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race.”

130. Baker, *supra* note 104 at 1219.

such an extreme proposition would demand that all public, and some private, commodities be distributed free of charge, thus creating not only a legal obligation for free education and health care but also the basis for the argument that an individual's unique financial power to publish a newspaper is a violation of the distribution of free speech; and that one's capacity to travel abroad while others cannot leave their own city should be analyzed in terms of distribution of the right to travel. But, despite the fact that such an argument should be employed cautiously, the extreme examples should not obscure the danger of creating a "constitutional caste"¹³¹ of poor individuals who sell fundamental rights, such as marriage and bodily integrity, while these rights are enjoyed by more affluent members.¹³²

The second perspective observes the impetus of equality while focusing on the equal right to enjoy the benefit. Even without categorizing the benefit as a right, it may be argued that once the government decided to grant the benefit, it created a new baseline, and distinctions between beneficiaries should be strictly monitored. This approach seems more promising, since the relevant individuals share a common economic background. Therefore, the purported distinction between members of this group is not based on their different economic situation but on other features, such as marital status, that are more controversial when suggested as relevantly distinguishing between individuals. So the state may be understood to be saying, in essence, that all impoverished individuals are entitled to benefits, *apart* from those cohabiting without marriage, for example. One may then argue that a public policy that distinguishes between recipients of benefit on such a basis violates the obligation not to promote any particular comprehensive doctrine.¹³³

vi) Consideration of Fundamental Rights: This argument focuses directly on the fact that through the employment of illegitimate conditions, fundamental rights are put at risk.¹³⁴ It has been proposed that constitutional rights are similar to any other valuable commodity and should be allowed to be sold if an individual finds that it would improve her condition.¹³⁵ However, several authors have countered that fundamental rights are inalienable and cannot be sold away. The basis for this argument varies, and includes the paternalistic attitude not to trust people's assessment of long-term risks;¹³⁶ an argument from personhood according to which some things are not for sale;¹³⁷ and a law and economic analysis that states that inalienability amends market failures that result from transaction costs or collective action problems.¹³⁸

131. Sullivan, *supra* note 100 at 1497-99. See Justice Marshall's emphatic dissent in *Harris v. McRae*, 448 U.S. 297 (1980) at 338 where the challenged legislation was described as "the product of an effort to deny the poor the constitutional right recognized in *Roe v. Wade*."

132. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

133. John Rawls, "The Priority of Right and Ideas of the Good" (1988) 4 *Phil. & Pub. Affairs* 251 at 262-63; Ronald Dworkin, "Liberalism" in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 191; Raz, *supra* note 6 at 114-15; Philippe van Parijs, "Basic Income Capitalism" (1992) 102 *Ethics* 465 at 474.

134. Frost, *supra* note 105 at 594.

135. Frank Easterbrook, "Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information" (1981) *Sup. Ct. Rev.* 309 at 347.

136. William Fisher, "Reconstructing the Fair Use Doctrine" (1988) 101 *Harv. L. Rev.* 1659 at 1762-65.

137. Michael Walzer, *Spheres of Justice* (Oxford: Blackwell, 1983) at 100-03.

138. Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv. L. Rev.* 1089 at 1111-15.

Kathleen Sullivan presents a persuasive reply to each of these grounds for inalienability.¹³⁹ In short, paternalism and personhood seem ironic bases for rights that purport to advance and protect choices, since they are strategies that advance an objective that would limit personal choice.¹⁴⁰ Efficiency is an ideological collective value, which when used to justify autonomy rights, seems to reverse means and ends. But when she deals with what she finds as the most persuasive rationale for inalienability, that of distributive justice, Sullivan delivers the most damning critique to the project in general. When relating to the doctrine of illegitimate conditions, the theory of inalienability, she argues, asks the wrong question. Illegitimate conditions problems do not investigate whether a fundamental right is alienable in general, but rather whether it may be relinquished *to the government*. So what is required is “not a general theory of blocked exchanges, but a particularized theory for determining when to block surrender of preferred constitutional liberties to government.”¹⁴¹

Though theories of inalienable rights may not be satisfactory in general, they are important reminders that illegitimate conditions formulations may have an adverse impact on fundamental rights despite the fact that they managed to sift through the safeguards presented above. In such cases, courts have focused directly on the suppression of fundamental rights using traditional constitutional law approaches.¹⁴² And, indeed, it is important to allow a theory investigating the structure of illegitimate conditions to also inquire directly what impact they have on fundamental rights.

We find, then, that the argument from equality, the germaneness requirement and the consideration of fundamental rights all offer useful platforms for the analysis of illegitimate conditions. More importantly, their flexibility and ideological basis suggest that they are promising tools for the development of a more contextual theory that concerns the conditioning of welfare benefits.

Conclusion

This paper sought to show that the relationship between rights and duties, though complex and changing, cannot be used in a manner that detracts from the place that rights hold in social debates and legal decisions. The strengths and weaknesses of the interest and choice theories offered a useful starting point for the investigation. As even Hart accepted, the flaws of the choice theory bar it from serving as a general platform for the analysis of rights and duties. And yet, its critiques of the interest theory remain. Noteworthy amongst these critiques is the fear that, first, turning to collective interests when deciding what rights exist and, second, incorporating the idea of duties in the definition of rights both bring rights and duties too close together, thus threatening the independency of rights and undermining the place

139. Sullivan, *supra* note 100 at 1486-90.

140. A similar argument is advanced by Richard Epstein in his “Foreword”, *supra* note 93 at 12-13.

141. Sullivan, *supra* note 100 at 1489.

142. Note, “Another Look at Unconstitutional Conditions” (1968) 117 U. Pa. L. Rev. 144 at 151-58.

that rights should have in practical reasoning. This, it was stressed in the first two sections, is not a necessary character of the interest theory, but may well be an explanation for the current popularity of the idea that there are “no rights without responsibilities.”

The following sections investigated the foundations and implications of the claim. The third section served as a bridge between the first two sections and the concluding section. On the one hand, it continued the jurisprudential emphasis, introducing the idea that increased conditionality could curtail rights in a manner that has the potential to deprive them of their effectiveness, both in the process of considering a proper social policy and at the stage of judicial review. On the other hand, it delved into the doctrinal by showing how contemporary welfare-to-work programs increasingly *construct* welfare rights on the fulfillment of duties. The emphasis on reciprocity as a governing ideal in current reforms provided an opportunity to introduce a wide array of obligations as preconditions for welfare claims. The fact that the same obligations were not accepted in the “classical” era of the welfare state suggests that we are witnessing a break with the tradition that held that X’s rights entail that only *someone else*, and not X, is under a duty.¹⁴³ The final section then investigated the ideas that inform the doctrine of illegitimate conditions towards a theory that befits the context of welfare-to-work programs.

All four sections of this paper, then, have one overarching idea in common: the threat that the paradigm underlying current social policy poses to the rights of claimants.

143. Kramer, *supra* note 4 at 43.